

No. 14,965

IN THE

United States Court of Appeals  
For the Ninth Circuit

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WARREN C. GRAHAM and AGNES B. GRAHAM,  
his wife, and CATHERINE YOUNG COBB,  
*Appellants,*

vs.

UNITED STATES OF AMERICA, STATE OF CALI-  
FORNIA, CITY OF OAKLAND and COUNTY OF  
ALAMEDA,  
*Appellees.*

On Appeal from the Judgment of the United States District Court  
for the Northern District of California.

APPELLANTS' REPLY BRIEF.

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FILED

MAR 19 1957

PAUL P. O'BRIEN, CLERK



## **Subject Index**

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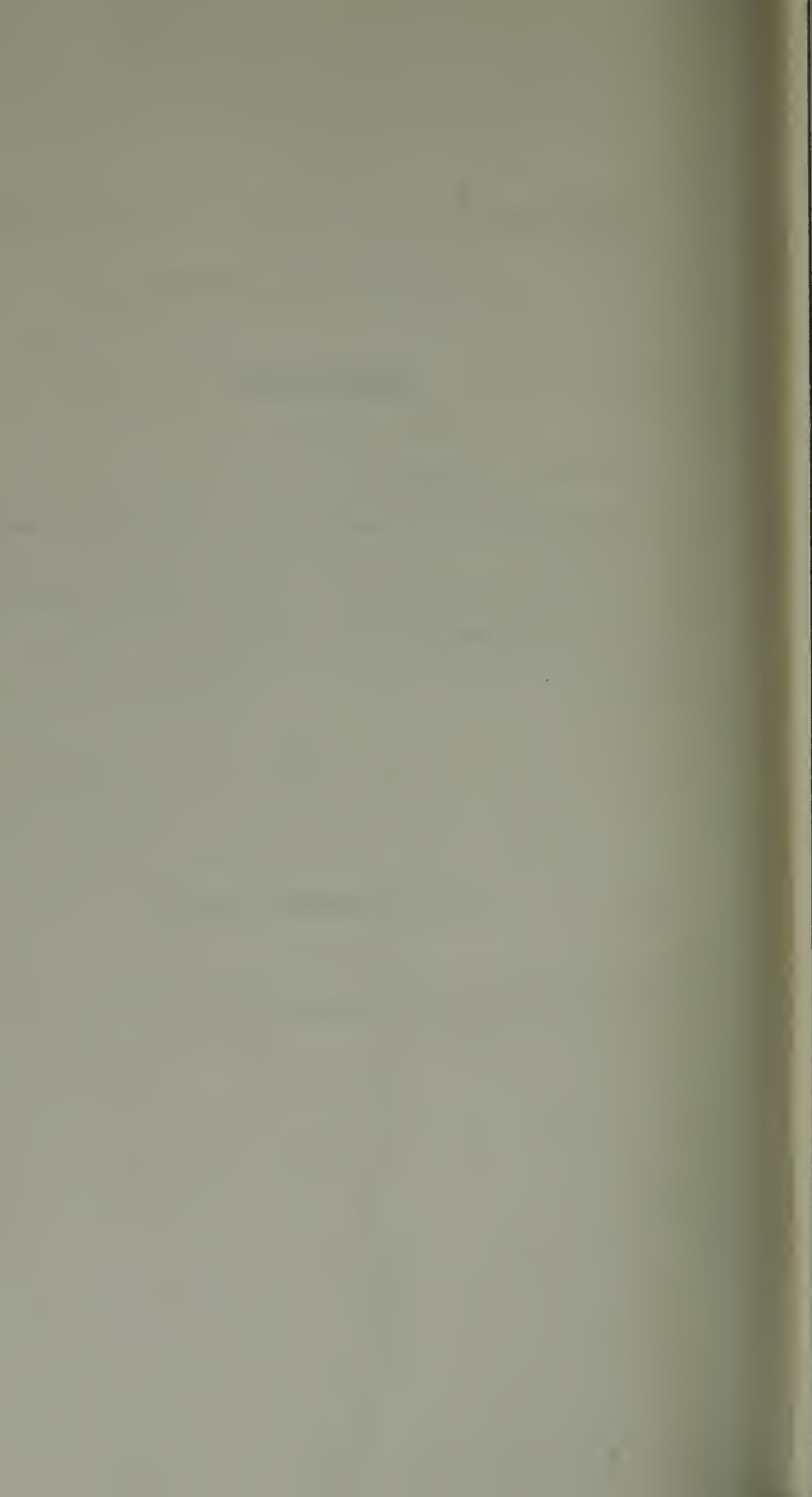
	Page
I. Preliminary statement .....	1
II. 1942 assessment of income and excess profits taxes was invalid .....	2
III. As 1942 taxes are invalid, lien on real property must fail	3
IV. Tax waivers were obtained under duress .....	4
Conclusion .....	5

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## **Table of Authorities Cited**

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	Page
Internal Revenue Code of 1939, Section 272 .....	2



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**I. PRELIMINARY STATEMENT.**

The Government in its brief has seen fit to state many facts completely outside the record. This is particularly true with reference to alleged other actions involving appellants (App. Brief pages 7, 12, 21) which are not before this Court and have no bearing on the issues herein.

In addition, it should be pointed out that in the main the Government has not found any authorities in support of their position, but rather seek to refute the arguments and authorities cited by appellants

ply by a restatement of facts. Some point seems to be made by the Government that the appellant Warren C. Graham had made payment of one-half of the 1942 tax liability and had failed to seek a refund which indicated in theory that he had not ignored administrative requirements. It should be pointed out that no payment was made by the taxpayer and that there is no evidence in the record to that effect; that in fact collection had been effected by the Government by other means and application of such collections had been made by the taxing authorities within their own discretion to this particular liability.

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## II. 1942 ASSESSMENT OF INCOME AND EXCESS PROFITS TAXES WAS INVALID.

Appellants reiterate that their primary position is that the 1942 assessments levied against them was invalid by reason of the failure of the Government to send the necessary 90 day letter required by the Internal Revenue Code of 1939, Section 272, which provides:

“No assessment of a deficiency in respect to the tax imposed by this chapter . . . shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90 day period . . .”

The Government alleges at page 12 of its brief:

“There is nothing here to indicate that the prescribed statutory procedure for making assessments was not followed”.

As pointed out in appellants' opening brief, page 10, and upon reading of the record herein, pages 122, 188 and 189, it was then, and is now the position of the appellants that the prescribed procedure was not followed; that no evidence was introduced by the Government indicating that it was; that on the contrary, the only evidence was to the effect that no 90 day letter was sent. It is resubmitted that the appellant offered to prove that the statutory requirements were not met; the Court refused such offer of proof; this ousted the Court of jurisdiction and made invalid the subsequent proceedings.

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**III. AS 1942 TAXES ARE INVALID, LIEN ON  
REAL PROPERTY MUST FAIL.**

Appellant does not argue with the proposition of the Government that the 1945 and 1946 taxes were uncontested. Appellants position, however, is as follows:

Appellants purchased the real property in October of 1945. At that time there were no tax liens in existence. Appellants transferred property to Frank B. Hansen on August 6, 1946. At that time no tax liens existed as the 1942 assessments were invalid. The assessments for 1945 taxes were not levied until December 6, 1946. The assessments for 1946 taxes were not levied until 1947. The Court found, as indicated on page 4 of the Government's brief that:

"The transfer (to Frank Hansen on August 6, 1946) was for the purpose of avoiding and defeating Federal tax liens."

is submitted that if no tax liens existed, then this finding of the Court with reference to sham must of necessity fail. To support the Government's position the Court would have had to have made a finding that the transfer was made to defeat tax liens not yet in existence and for a year which was not yet completed when the tax liability could not have possibly have accrued, i.e. 1946. The only evidence in the record to the effect that the appellants had a net worth of \$1000.00 on August 6, 1946, and were solvent. Appellee attempts (Appellee's Brief, page 25) to prove solvency by indicating Government's claims for taxes for 1945 and 1946. There is no evidence to indicate that part, if any, of the 1945 and 1946 had accrued at the time of the transfer in August 1946 and obviously the 1946 taxes could not have yet arisen; there is nothing in the record to indicate either claims or liens against appellants on August 6, 1946.

It is submitted that the Government's reported claim of lien for 1945 and 1946 taxes is based on a finding which of necessity must rely on the invalid 1942 assessments; that such finding must fall and that no lien can therefore exist as against the property herein.

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#### IV. TAX WAIVERS WERE OBTAINED UNDER DURESS.

Appellant reiterates its position that the waivers obtained by appellant Warren C. Graham here during his term at McNeil Island were executed under duress; that the evidence substantiates only such a finding and



must in fact be presumed as a matter of law. The failure of the District Court to find on this point was prejudicial and merits reversal.

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**CONCLUSION.**

The decision of the District Court should be reversed.

Dated, San Francisco, California,  
March 18, 1957.

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THOMAS M. JENKINS,  
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